BANDAR RAYA DEVELOPMENTS BHD. v. WOON HOE KAN & SONS SDN. BHD.

[F.C. (Azmi L.P., Suffian and Ong Hock Sim F.JJ.)

November 6, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 73 of 1971]

Contract — Building contract — Claim for payments under interim certificates — Whether there is right to set off or counterclaim.

This was an appeal against the order of Harun J. granting leave to the respondents to sign final judgment being the sum due under two contracts and duly certified by the engineer in respect of certain civil engineering works. The appellants had sought to set off and counterclaim against the respondents in respect of damage, losses and expenses suffered or incurred by the appellants.

Held, dismissing the appeal: a debt due under an interim certificate was a debt of a class which might not to be allowed to be made the subject of a set off or counterclaim and therefore the order of the trial judge in this case must be affirmed.

Cases referred to:

(1) *Dawnays Ltd.* v. *F.G. Minter and Tullope and Colls Ltd.* [1971] 1 W.L.R. 1205.

(2) *Frederick Mark Ltd.* v. *Schild* (London) *Times* October 21, 1971.

FEDERAL COURT.

V. C. George for the appellants.

Edgar Joseph Jr. for the respondents

Ong Hock Sim F.J. (delivering the judgment of the court): The appellants, a housing development company appeal against that part of the order of Mr. Justice Harun Hashim made on the 28th June, 1971 granting leave to the respondents to sign final judgment in their claim under a specially indorsed writ for the sum of $860,165.17 being the balance due under two contracts in writing dated the 5th July, 1966 and 7th July, 1967 and duly certified by the engineer appointed by the appellants to be due to the respondents in respect of certain civil engineering works carried out by the respondents in connection with the development of Bandar Raya, Kuala Lumpur.

As is admitted in paragraph 4 of the affidavit of Mr. Ong Boon Bah, secretary to the appellant company sworn to on the 7th June, 1971 this sum of $860,165.17 is due under the contracts referred to in the foregoing paragraph, but the appellants claim they are entitled to set off and counterclaim against the respondents in respect of damage, losses and expenses suffered or incurred by the appellants and in respect of all claims, demands, proceedings, charges and expenses made against the appellants by third parties arising out of or due to the negligent manner in which the works were implemented by the respondents. The appellants claimed in paragraph 5 of the said affidavit of Mr. Ong that they had incurred expenses and costs amounting to $510,000 as set out in the said paragraph. In a later affidavit sworn to on the 24th June 1971, Mr. Ong stated that a sum of $80,000 to account of the sum of $410,000 allegedly due to the Commissioner of the Federal Capital only had been paid and also that the $100,000 incurred as alleged in the former affidavit had not to date been paid. Particulars of the acts of negligence, the expenses and costs, a pending action in Kuala Lumpur High Court and anticipated actions claiming damages from the appellants are set out in paragraphs 4, 5, 7 and 8 of the affidavit just referred to. The appellants further claim by clause 22 of the general conditions annexed to the said contracts the respondents undertook to indemnify and keep indemnified the appellants against such losses and claims.

For the purposes of the present appeal, appellants' counsel sought to distinguish the facts of the case of *Dawnays Ltd.* v. *F. G. Minter and Trollope and Colls Ltd.*[1] from those of the present. He argued that where there is provision in the contract for permitted deductions, such sums may be set off against sums due under interim certificates. He urged further that clause 22 of the general conditions is such a provision. In our view, clause 13 of the sub-contract in *Dawnay's* case authorises or empowers deduction or set off in respect of any sum which the sub-contractor is liable to pay to the contractor under the sub-contract. We can find no provision to that effect in the two contracts. Lord Denning said however that sums to be deducted or set off must be liquidated or ascertained sums established or admitted as being due. Appellants' counsel therefore abandoned the unascertained claims referred to in paragraphs 7 and 8 but said that the appellants should be allowed to set off the sum $507,440.50 which he says is a liquidated or ascertained sum. We are unable to agree, having regard to the affidavit of Mr. Ong of the 24th June, 1971 to which we now refer:

"5. To date the sum of $80,000.00 has been paid by the Defendant Company to the Commissioner of the Federal Capital. A copy of the said Agreement of the 15th day of April, 1970 is now shown to me and attached hereto marked 'OBB A'.

7. The $100,000.00 said to have been incurred by way of expenditure for remedial measures have not been paid as yet. The remedial works are now being undertaken and consists of:

i. Main drain connection to the canalisation of the Sungei Puteh	$22,440.00
ii. Repairs to and clearance of Main drains estimated at	$25,000.00
iii. Remedial measures to lands belonging to Realty Development of Malaysia Corporation Berhad estimated at	$50,000.00
	$97,440.00

10. Further the implementation of the said remedial works have and continue to cause further administrative costs and expenditure on the part of the Defendants Company have a valid claim against the Plaintiffs estimated at $10,000,00."

We also refer to the agreement with the Commissioner of the Federal Capital. It recites that the existing Sungei Puteh in addition to being heavily silted up is inadequate to cope with the increased rate of run-off and the commissioner and the company are desirous of alleviating floods and silting problems in the affected areas, namely Lorong Ma'arof, Jalan Ma'arof and Jalan Bungsar. The company in consideration of the commissioner undertaking to carry out the desilting of and the design and construction

of an improvement scheme to Sungei Puteh, undertook to contribute to the commissioner the sum of four hundred and ten thousand dollars ($410,000) being the company's agreed share of the cost of the desilting and the said improvement scheme. Nowhere does it appear in the agreement that the works were rendered necessary as a result of the negligence of the respondents in execution of the contract works though we may assume that the company's operation, whether or not negligent, may yet make an improvement scheme desirable. We are therefore of the opinion that the appellants cannot claim entitlement to set off this sum against the respondents, even though it may be said that, in terms of the agreement, the company is bound to pay the said amount.

We would also refer to the recent Court of Appeal decision in England reported in the *Times* of the 21st October, 1971 in the case of *Frederick Mark Ltd.* v. *Schild.*(2) The Court of Appeal in that case referred to *Dawnay's* case and categorically stated that the court agreed with every word Lord Denning said. This was to the effect that the purpose of interim certificates was to see that payments made under them were without any correlative right to set off or counterclaim as that would run counter to the very purpose of interim certificates — to provide cash for the contractor or sub-contractor to get on with the work. A debt due under an interim certificate was a debt of a class which ought not to be allowed to be made the subject of a set off or counterclaim.

We would respectfully follow the two decisions referred to and accordingly affirm the order of the trial judge and dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Ng Ek Teong & Partners; Joseph & Son.*

MOHAMED BIN LONG v. PUBLIC PROSECUTOR

[F.C. (Suffian, Gill and Ong Hock Sim F.JJ.)
November 27, 1971]

[Kuala Lumpur — Federal Court Criminal Reference No. 2 of 1971]

Bribery and Corruption — Presumption — Whether presumption under s. 14 of Prevention of Corruption Act, 1961 prevails over the presumption under s. 30(1) of the Bills of Exchange Ordinance, 1949 — Whether cheque drawn by a third person and received by accused can be regarded as illegal gratification — Prevention of Corruption Act, 1961, ss. 4(a), 13 and 14.

This was a reference to the Federal Court on the following questions of law:—

(1) whether the presumption under section 14 of the Prevention of Corruption Act, 1961, is a specific presumption;

(2) whether the presumption under section 30(1) of the Bills of Exchange Ordinance, 1949, is a general presumption;

(3) whether the presumption under section 14 of the Prevention of Corruption Act, 1961, as an alleged specific presumption prevails over the alleged general presumption under section 30(1) of the Bills of Exchange Ordinance, 1949;

(4) whether the gratification of $600 mentioned in the charge against the appellant as cheque No. S 759320 drawn on the Indian Overseas Bank Limited Mountbatten Road, Kuala Lumpur, by another firm other than the firm of Kapur Sawmill which latter firm was alleged to have given a bribe of $600 to the appellant in consideration of the appellant's alleged arrangement with Kapur Sawmill to refrain from collecting royalty on timber conveyed to Kapur Sawmill can be said to be a corrupt gratification in terms of the Prevention of Corruption Act, 1961.

The appellant had been convicted in the sessions court and his appeal to the High Court had been dismissed. The alleged gratification was in the form of a cheque drawn by a third party which was received by the appellant.

Held: (1) the presumption under section 14 of the Prevention of Corruption Act prevails over the presumption under section 30(1) of the Bills of Exchange Ordinance. There was in fact no conflict between the two presumptions as each deals with a different matter. The presumption under the Bills of Exchange Ordinance deals with civil claims based on cheques and it cannot arise in proceedings under the Prevention of Corruption Act, 1961;

(2) it is an offence for an agent to receive from any person gratification as a reward for showing favour to that person or to any other person, not necessarily the giver of the gratification;

(3) in this case there was evidence to show that the cheque was handed over to the appellant at the request of the party alleged to be framed by the appellant;

(4) in the circumstances the appellant was rightly convicted;

(5) both the learned president and the learned judge when disposing the matter overlooked the mandatory provisions of section 13 of the Act. In addition to the sentence imposed by the learned president, the appellant had to pay as penalty to the Forestry Department within 15 days the sum of $600 he accepted in contravention of the Act.

Cases referred to:-

(1) *Public Prosecutor* v. *Yuvaraj* [1969] 2 M.L.J. 89, P.C.

(2) *Subramaniam* v. *Public Prosecutor* [1956] M.L.J. 220, P.C.

(3) *Tan Chow Soo* v. *Ratna Ammal* [1969] 2 M.L.J. 49, P.C.

(4) *De Silva* v. *Public Prosecutor* [1964] M.L.J. 81.

(5) *Berry* v. *British Transport Commission* [1961] 3 All E.R. 65.

FEDERAL COURT.

R. R. Chelliah (*Wan Adnan* with him) for the appellant.

Anwar bin Zainal Abidin (Legal Adviser, Pahang) for the respondent.

Cur. Adv. Vult.

In the court below *C. O. Lim* (*Wan Adnan* with him) appeared for the appellant and *Hassan bin Ishak* (Deputy Public Prosecutor) for the respondent. The following judgment was delivered on May 16, 1971:

Ibrahim J.: This is an appeal against the decision of the learned president, sessions court, Kemaman, who convicted and sentenced the appellant to six months' imprisonment on the following charge:

"That you on or about 14.11.1965 at Kapur Sawmill Kerteh, in the District of Kemaman, in the State of Trengganu, being an agent employed by the Government of Malaysia, as a Forest Ranger of the Forest Department Trengganu did corruptly accept from one JOHNSON (m) for yourself a gratification of $600 in cheque No: S 759320 drawn on the Indian Overseas Bank Limited, Mountbatten Road, Kuala Lumpur